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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH STAPLETON, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110), and ALL PERSONS INTERESTED THEREIN,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief and the Associate Justices of the Supreme Court of the United States:

Petitioners Joseph Stapleton, Treasurer of the County of Hudson, and the County of Hudson respectfully pray

that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which reversed the judgment entered in favor of petitioners in the United States District Court for the District of New Jersey.

Opinions Below

The opinions rendered in the Court of Appeals are printed in Appendix A (5a to 30a),* and are reported in 454 F.2d 1210 (1972). The opinion of the District Court has not been reported and is printed in Appendix B (31a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code §1254(1).

The judgment of the Court of Appeals was entered on January 25, 1972, and a petition for rehearing was denied February 28, 1972 (App. A, 1a to 3a).

Questions Presented

Introductory

Petitioner, County of Hudson, a political subdivision of the State of New Jersey, brought an action in the state court against the District Director of Internal Revenue

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* The appendix to this petition is separately bound and filed herewith.

for wrongfully levying on property—specifically $2.4 million in cash—belonging to Joseph V. Moriarty, an oft-convicted gambler, on the ground that Moriarty's property rights therein had been forfeited to the County of Hudson prior to the time that the Government's tax lien arose. The District Director removed the action to the Federal District Court pursuant to 28 U.S.C., §1442(a)(1), it appearing from the removal petition that the District Director had deposited the money into the Treasury prior to suit. The action was tried in the District Court as a suit seeking *in personam* relief against the District Director for wrongfully appropriating plaintiff's property and, alternatively, against the United States, which had been added as a party defendant, because of the enactment while the litigation was pending, of 26 U.S.C., §7426 (approved November, 1966).

The trial in the District Court resulted in a judgment in favor of the plaintiff against the United States and in the alternative against the District Director. The Court of Appeals for the Third Circuit reversed.

The questions presented are:

1. Did the Court below err in holding that petitioners' suit against the District Director, which sought a personal judgment against him for wrongfully levying upon and covering into the Treasury petitioner's property in order to satisfy a tax lien against Moriarty, was a suit against the United States and therefore could not be instituted in the state court?

2. Did the Court below, in reversing the judgment of the District Court on the asserted ground that the state court from which the action was removed had no jurisdiction and therefore the federal court lacked jurisdiction, thereby render a decision in conflict with the holding of another Court of Appeals in the Ninth Circuit in *Johnston* v. *Earle*, 245 F. 2d 793 (1957)?

3. Should not the conceptual basis of "derivative" federal removal jurisdiction be rejected in this case by reason of the fact that while the suit was pending in the Federal District Court pursuant to the District Director's removal, Congress enacted 26 U.S.C., §7426, which, for the first time, permitted such actions to be brought directly against the United States in the Federal Courts, and provided for the substitution of the United States as a party defendant as of the time when such action was commenced?

4. Did the Court below render an opinion on the merits in conflict with the applicable decisions of this Court holding the question of whether, and to what extent, a taxpayer has "property" or "rights to property" under 26 U.S.C., §6321, to which a Federal tax lien could attach to be solely a matter of state law?

5. Did the Court also decide important questions of New Jersey law in a manner contrary to the applicable decisions of the New Jersey Supreme Court? Specifically, were the District Court's express findings that the money in suit was a product of gambling and was needed by Moriarty as the "bank" for his large-scale, non-syndicated numbers operation supported by substantial evidence?

6. Did the Court below err in holding that a New Jersey statute of limitations, raised for the first time by the United States on appeal, barred the County's substantive claim?

Statutes Involved

26 U.S.C., §6321 provides:

> "Lien for taxes
>
> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount

(including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

26 U.S.C., §6322 provides:

"Period of lien

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."

28 U.S.C., §2006 provides:

"Execution against revenue officer

"Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:

"(1) probable cause existed or

"(2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.

"When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury."

26 U.S.C., §7426 (P.L. 89-719, §110(a), approved November 2, 1966), which for the first time, provided that third persons (non-taxpayers) who claimed an interest in property wrongfully levied upon could bring civil actions directly against the United States. The provisions thereof are lengthy and are printed in Appendix E, 73a.

28 U.S.C., §1442(a)(1), pursuant to which the District Director removed this action to the District Court, provides in pertinent parts as follows:

> "Federal officers sued or prosecuted
>
> "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

The following New Jersey statutes, as interpreted and construed by the Supreme Court of New Jersey, are involved: N.J.S.A. 2A:152-6 (derived from New Jersey Laws, 1878, ch. 78, p. 137), and New Jersey Laws, 1941, ch. 70, p. 156 which now appear as N.J.S. 2A:152-7, 8 and 9. Although nothing in the case turns on the language of the statutes, they are printed in Appendix E, 76a to 79a.

N.J.S.A. 2A:14-10, a New Jersey limitations statute, is cited and quoted in full in the opinion below (App. A, 17a), and printed in App. E at 79a.

Statement

This petition presents for review an important question of federal jurisdiction decided adversely to petitioner in the Court below. To pose that question, as well as the questions resulting from the divergent views expressed in the opinions rendered in the Court below as to the merits of the controversy,* it is necessary to trace the proceedings in some detail.

This action involves competing claims of petitioner County of Hudson and respondents United States of America and Chris L. Gross, former District Director of Internal Revenue for the District of New Jersey, to the sum of $2,438,110. This amount of cash was discovered on July 3, 1962, when some workmen who were installing overhead doors in private garages located at 127-131 Oxford Avenue, Jersey City, New Jersey, broke into the trunk of an old, inoperable automobile parked in one of the garages.

The garage was rented by, and the car and currency had been in the possession and control of one Joseph V. Moriarty, the reputed kingpin of the "numbers racket" in and around Jersey City.

The United States based its claim on a jeopardy assessment, made by defendant Gross against Moriarty on July 5, 1962, and a consequent federal tax lien against Moriarty

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* The opinion of the Court, per Judge McLaughlin, holds that the District Court erred as a matter of law in deciding the case on the merits in favor of the County. The concurring opinion, filed by Judge Adams and concurred in by Judge Ganey, holds that if subject matter jurisdiction had been present in the District Court, he would have remanded the case for further findings of fact (App. A, p. 30a).

arising as of that date, under 26 U.S.C., §§6321 and 6322. The County, on the other hand, contended that by July 5, 1962, any "property" or "rights to property" which Moriarty may have had in the money, had already been forfeited to the County under state law by reason of its connection with Moriarty's illegal gambling operation. 26 U.S.C., §6321, and *Aquilino* v. *United States,* 363 U. S. 509, 512 (1960).

Moriarty's criminal record for violations connected with his illegal gambling activities dates from the 1930's. On February 20, 1962, while free on bail pending sentence (pursuant to a previous plea of guilty to a 1960 gambling indictment) he was again arrested by local law officers and charged with possession of lottery slips. Bail was immediately revoked, he was remanded to custody and sentenced to a term of years in the state's prison. He remained in official custody at all relevant times thereafter.

The $2.4 million involved in this suit was discovered, as stated, on July 3, 1962, some four-and-a-half months after Moriarty's last arrest had put him out of business. The workmen notified the F.B.I. of the discovery. Agents of that department thereby obtained physical custody of the money at the outset, and later turned the money over to the United States Marshal.

On July 5, 1962, defendant Gross made a jeopardy assessment against Moriarty for delinquent income taxes and interest in the amount of about $3.4 million, which assessment was based, for all practical purposes, solely on the discovery of July 3. On July 16, Gross levied upon the money in the hands of the Marshal, received possession of the funds and deposited them to the credit of the Internal Revenue Service in the designated depositary bank.

Meanwhile, on July 6, 1962, Jersey City police had discovered the sum of $168,400.97, as well as assorted gambling paraphernalia in a private garage located just down the street from the garage in which the $2,438,110 had been found three days earlier. That sum of money likewise belonged to Moriarty.

The suit at bar was instituted by the County in September, 1962, in the New Jersey Superior Court to obtain an adjudication that the $2.4 million was "used and intended to be used by Moriarty as an integral part of his illegal gambling operation and with the proceeds thereof" (App. G, p. 92a), and was thus contraband and forfeited to the County under New Jersey law. N.J. S. 2A:152-6, *et seq.* The complaint referred to Chris L. Gross, District Director of Internal Revenue, as one of several parties who had asserted a claim to the money. The complaint also alleged that the $2.4 million were being held "subject to a determination by a court of competent jurisdiction that part or all of said moneys should be turned over to persons or governmental agencies other than the United States."* (*Ibid.*).

On October 16, 1962, the District Director removed the action to the United States District Court. The removal petition recited the various steps taken by Gross to enforce the July 5, 1962 tax lien against Moriarty, ending with the deposit of the $2.4 million in the Nation-

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* The quotation was taken from the United States Attorney's letter of July 20, 1962, advising an attorney for other claimants to the fund that although the money was then "credited" to the account of the Internal Revenue Service . . ." it would be "made available . . . if it is determined subsequently by a court of competent jurisdiction that part or all of said property should be re-distributed to persons or governmental agencies other than the United States of America" (App. H, p. 110a).

al State Bank in Newark, and the statement that "within 24 hours [thereafter] said moneys were credited to the account of the Secretary of the Treasury . . . and thus covered into the United States Treasury." The removal petition asserted that the aforesaid acts were performed by Gross "solely under the color of his office" and that the action was therefore removable under 28 U.S.C., §1442 (a)(1) (App. G, 95a to 98a).

The County thereafter moved, unsuccessfully, to remand the suit to the state court. In denying the motion, the District Court filed an opinion (App. C, p. 39a), holding (1) since the money had been covered into the Treasury before the suit was instituted, neither the State nor the Federal Courts could exercise any jurisdiction *in rem;* (2) although the complaint was captioned in the form of an *in rem* action, the real purpose of the suit was to obtain a judgment *in personam* against the District Director for levying on property which the County claimed had been forfeited to it under state law; (3) the action therefore was removable under §1442(a)(1); and (4) the federal court, as well as the state court was "competent to adjudicate the rights to the fund on an *in personam* level" (App. C, p. 44a).

Accordingly, with the consent of the United States Attorney, prior to trial the County filed an amended pleading, the effect of which was to make the prayers for relief technically conform to an *in personam* action (App. G, pp. 99a).

The District Director's answer to that pleading, filed May 29, 1968, asserted, for the first time, that by reason of the passage of 26 U.S.C. §7426 (approved November, 1966), the case should be dismissed as to the District Director and the United States substituted as the party

defendant (App. G, p. 102a). That statute changed pre-existing law by providing that third persons (non-taxpayers) could maintain suits directly against the United States for wrongful tax levies (App. E, p. 73a).

The pleadings were thereafter twice amended (App. G, 103a to 109a) the net effect being that the action proceeded to trial against the United States (under 26 U.S. C., §7426), and alternatively against the District Director, coupled with a prayer that in the event of judgment against the latter a certificate be issued for payment of the judgment out of the United States Treasury pursuant to 28 U.S.C., §2006 (App. E, 109a).

The case was tried in the District Court during January, 1969. The testimony on both sides concurred in the factual conclusion that the $2.4 million was wholly the product of Moriarty's gambling business. A State prosecutor's investigator and a staff detective, appearing for the County, testified that the money was the proceeds of gambling (R327a; 330a-336a; 377a; 380a-388a)*; while a special agent of the Internal Revenue Service, testifying for the Government, who had engaged in prolonged tax investigations of Moriarty's activities, described the fund as "a cash hoard . . . from . . . his wagering business" (R604a; 606a-607a; 641a).

The County also adduced substantial evidence that the money was an integral part of Moriarty's gambling operation because it was used, or held for use by Moriarty, as the "bank" for his huge, solely-operated "numbers" business (*i.e.*, it was the "money required to pay off bets where the wheel of fortune gives a negative answer." *State* v. *Link,* 14 N.J. 446, 453, 102 A.2d 609, 613 (1954)).

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* "R" refers to the printed appendix to the brief filed by the United States in the Court of Appeals.

At the close of the trial, the District Court reserved decision because the New Jersey Supreme Court had just granted certification in the related case involving the moneys seized on July 6, 1962.*

In November, 1969, the New Jersey Supreme Court affirmed the lower court's judgment in favor of the County. *Farley* v. *$168,400.97,* 55 N.J. 31, 259 A.2d 201 (1969). The opinion, which contains an exhaustive discussion of New Jersey forfeiture law, is printed in Appendix D, p. 50a.

Thereafter, on May 25, 1970, the District Court filed its opinion herein, holding that in view of the state law as set forth in *Farley* v. *$168,400.97, supra,* Moriarty's title to the $2.4 million had been divested and forfeited to the County of Hudson as gambling contraband, so that any interest which Moriarty may have had in the currency was extinguished and his property rights thereto forfeited to the County prior to July 5, 1962, the effective date of the Federal tax lien (App. B, p. 31a). Judgment was entered in favor of the County against the United States pursuant to 28 U.S.C., §7426, and in the alternative, but only in the event that it should ultimately be determined that §7426 did not apply to this action, against the District Di-

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* That case was also brought by the County in the state court and removed by the District Director to the District Court, under 28 U.S.C., §1442(a)(1). However, in that case, the County officials obtained physical custody of the funds at the outset, so that the State Court had jurisdiction and control over the *res* and no *in personam* relief was being sought "against" the District Director. Accordingly, in an opinion published *sub nom State of New Jersey* v. *Moriarty,* 268 F.Supp. 546 (1967), the District Court had held that that action was not removable by the District Director under §1442(a)(1), and had granted the County's motion to remand.

rector, together with an appropriate certificate for payment of the judgment out of the United States Treasury, pursuant to 28 U.S.C., §2006.

The Court of Appeals reversed. The opinion of the court, per Judge McLaughlin, as well as the concurring opinion per Judge Adams, held that the District Court lacked jurisdiction over the subject matter because the State court from which the action was removed lacked jurisdiction. Both opinions also dealt with the merits. Judge McLaughlin concluded that, as a matter of law, the moneys on suit were not subject to forfeiture under New Jersey law. Judge Adams held that if jurisdiction were present, the matter would have to be remanded to the District Court for further findings of fact regarding Moriarty's use of the $2.4 million (App. A, 30a). Judge Ganey concurred in result and in Judge Adams' concurring opinion (20a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Court below erred in its characterization of the petitioner's action against the District Director seeking a personal judgment against him for wrongfully levying on and covering into the Treasury petitioner's property, as a suit against the United States and consequently not within the original jurisdiction of the state court.

In reversing the District Court's judgment and ordering the case to be dismissed for want of subject matter jurisdiction, the Court below relied upon *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* 258 U.S. 377, 382 (1922), which holds: "The jurisdiction of the federal court

on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

However, in holding that the state court lacked subject matter jurisdiction over the case at bar, the Court below decided an important question of federal jurisdiction in a way that conflicts with applicable decisions of this Court, which have uniformly held that suits against district directors (formerly collectors) of Internal Revenue, which were derived from the common law, are not in legal contemplation suits against the sovereign.

A.

It must first be noted that the determination below was based upon a demonstrably erroneous premise as to the true nature of this suit. The opinion below states (App. A, p. 9a):

> "At no time in fact or in law did state or local officers possess custody or control of the currency; the state court simply never did have jurisdiction over the subject matter."

Although state officers never had "custody or control" over the $2.4 million, in a physical sense, it does not follow therefrom that the state court therefore never had jurisdiction over the *subject matter* of the action. Jurisdiction over the subject matter of a suit denotes the power of a court to decide the controversy. That power can be exercised *in personam, i.e.,* by rendering a judgment that operates against party to the action, or *in rem,* in which case the judgment of the court affects parties to

the action only to the extent that they claim an interest in an identifiable *res*.

In the instant case, the money in suit had been deposited in a bank and covered into the Treasury prior to the institution of suit. This fact alone prevented any court, state or federal, from adjudicating the substantive issue as an incident of *in rem* jurisdiction. However, the absence of physical custody or control over the moneys in no sense prevented the state court, which admittedly had acquired jurisdiction over the person of the District Director, from deciding the controversy on an *in personam* basis, *i.e.*, by rendering a personal judgment against the defendant District Director for wrongfully appropriating the plaintiff's property.

Congress has specifically recognized that judgments *in personam* may be rendered against a collector or other revenue agent for the recovery of moneys "exacted by or paid to him and subsequently paid into the Treasury," by providing that where an appropriate certificate has been issued, execution shall not issue against the personal assets of the collector, but the amount of such judgments "shall be paid out of the proper appropriation by the Treasury." 28 U.S.C., §2006, and its predecessors; *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373 (1933); *United States* v. *Kales*, 314 U.S. 186 (1941).

The fact that the complaint, as originally filed, was erroneously captioned in the form of an *in rem* action is immaterial. It is settled that the true aim and object of the action, and not the designation invoked by the plaintiff, determines if it is *in rem* or *in personam*. *National Surety Co.* v. *Austin Machinery Corp.*, 35 F.2d 842 (6th Cir. 1929); *In re Lummis' Estate*, 118 F. Supp. 436, 439 (D.N.J. 1954); *Beck* v. *Otero Irr. Dist.*, 50 F.2d 951 (D.

Colo. 1931); *State of New Jersey* v. *Moriarty, supra* (268 F. Supp. at 557). ". . . A proceeding which aims at the person of the defendant and not at his property or some other thing within the power or jurisdiction of the court is not an action in rem." *National Surety Co.* v. *Austin Machinery Corp., supra* (at p. 843). In the instant case, once it became known that the money had been deposited by the defendant District Director into the United States Treasury, the only possible aim or object of this suit was to secure a personal judgment against the District Director for wrongfully appropriating property which the County claimed belonged to it under state law.

Indeed, if this had not been an action seeking a personal judgment against defendant District Director, he could not have removed the cause to the federal courts under 28 U.S.C., §1442(a)(1). It has uniformly been held that a suit which merely has as its object a determination of rights in specific property and does not expose a federal revenue officer to any personal civil or criminal liability, is not removable under §1442(a)(1). *State of New Jersey* v. *Moriarty, supra; Ford Motors Co.* v. *Automobile Insurance Co.,* 13 F.2d 415, 417 (E.D. Mich. 1926); *Fountain Park Co-op* v. *Bank of America,* 289 F. Supp. 150 (C.D. Cal 1968). And, as stated above, after removal the pleadings were amended so as to reflect the fact that this was an *in personam* action against the District Director (App. G, 99a), and later against the United States as well, by reason of the enactment of 26 U.S.C., §7426 during the pendency of the case (App. G, p. 108a). The case was tried on that basis and the judgment rendered in the District Court was unquestionably *in personam* and not *in rem.*

B.

In holding that the state court had no jurisdiction to determine this controversy, the Court below also stated (App. A, 12a):

> "It is settled law that a suit directly concerning the title to property in which the United States has an interest is a suit against the sovereign which absent the consent of the sovereign, cannot be maintained in the state court."

While the quoted statement may accurately reflect the settled law with respect to suits brought against other federal officers, it does not apply where, as here, the party defendant is a District Director of Internal Revenue and the object of the suit is to obtain a determination that the defendant has wrongfully levied on the property of the plaintiff in order to satisfy a third person's tax liability.

The historical basis and juridical nature of suits against collectors have been described in detail in many of this Court's opinions. See *e.g., Philadelphia* v. *Diehl,* 5 Wall. (72 U.S.) 720 (1867); *Moore Ice Cream Co.* v. *Rose* and *United States* v. *Kales, both supra.* The right to maintain such actions against collectors was based solely on the common law. As stated in *Philadelphia* v. *Diehl, supra,* the "appropriate remedy to recover money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received." Accordingly, such actions historically could be and were initiated in the state courts, subject to the collector's option to have the controversy determined on the merits in a federal forum by exercising his statutory right of removal. Thus, while such cases generally were litigated in the Federal Courts, they were often initiated in the

state courts without any apparent challenge to that original jurisdiction or to the Federal Court's jurisdiction after removal. See *e.g., Philadelphia* v. *Diehl supra,* and *Arnson* v. *Murphy,* 109 U.S. 238 (1883).

This Court's opinions in *Moore Ice Cream* and *Kales, supra,* trace the subsequent developments with respect to suits against collectors in considerable detail. For present purposes the main point is that at common law, and for many years under federal statutes, protest at the time of payment was a condition precedent to maintaining suit, and the protest was a warning to the collector not to pay into the Treasury the moneys collected. However, statutes first enacted in 1839, and progressively broadened thereafter, imposed upon the collector the duty to pay the money over to the Government, protest or no protest, and along with that duty there went a "pledge of indemnity by the Government itself", where, under appropriate circumstances, the amount of the judgment rendered against the collector was to be paid out of the Treasury. See *Moore Ice Cream Co.* v. *Rose,* 289 U.S. at 380-381; *United States* v. *Kales,* 314 U.S. at 197-199. At the time the suit at bar was instituted, that pledge of indemnity was contained in 28 U.S.C. §2006.

But those cases also clearly held, that the United States' promise of indemnity did not in legal contemplation convert the common law suits against collectors of Internal Revenue into suits against the Government. The doctrine of sovereign immunity was therefore inapplicable. Thus, although in a suit against a collector acting in the line of duty "his presence as a defendant is merely a remedial expedient for bringing the Government into court." *Moore Ice Cream Co.,* at p. 383, "the judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it." *United States* v. *Kales,* 314 U.S. at 199-200.

Although *Moore Ice Cream Co.* and *Kales* both involved suits by a taxpayer against the collector, the same relief has been held available to non-taxpayers, *i.e.*, persons claiming that the collector had wrongfully levied upon their property to satisfy another's tax liability. *Stuart* v. *Chinese Chamber of Commerce*, 168 F.2d 709, 713-4 (9th Cir. 1948); *First National Bank of Emlenton* v. *United States*, 265 F.2d 297, 300 (3rd Cir. 1959). In *Stuart*, the Ninth Circuit, after quoting from *United States* v. *Kales*, stated:

> "Thus it will be seen that Congress has devised by appropriate legislation the means of protecting not only the rights of a taxpayer but also to indemnify the collector on a certificate of probable cause against a personal judgment for illegally exacted taxes. We are not directed to any law which would deny the same protection to a non-taxpayer from whom moneys have been illegally seized, nor would good conscience sanction such procedure." 168 F.2d at 714.

Clearly, if a taxpayer's suit against a collector of Internal Revenue was based upon and derived from the common law, it necessarily follows that a non-taxpayer whose property had been wrongfully levied upon by the defendant collector had rights under the common law to maintain such suits (the only difference being that in the case of taxpayers, the common law remedy was in assumpsit; whereas in the case of non-taxpayers, the action would be in the nature of conversion or trespass). Therefore, such suits *prima facie* were cognizable in the state courts, and such jurisdiction existed unless it was negated by a clear statutory command.

The Court below cited no such federal statute. Nor are we aware of any statute in existence when this suit

was instituted in 1962, which derogated in the least from the County's right to attempt to litigate its substantive claim against the District Director in the state court, subject, of course, to the latter's removal option.

A fundamental distinction, not recognized in the opinions below, between suits brought by taxpayers as opposed to non-taxpayers, is that Congress had undertaken to deal specifically with the former. Thus, a taxpayer seeking to vindicate his rights must follow basic statutory procedures in challenging a federal tax assessment or levy against him. However, at the time this suit was instituted, Congress had prescribed no limitations on the manner or forum in which non-taxpayers could vindicate their rights where, as here, a collector had wrongfully levied upon his property and covered the proceeds into the Treasury.* It follows therefrom that the County retained its common law right to maintain an *in personam* action against the District Director in the state court, subject to the latter's removal option.

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* In the Court below, the Government had asserted that 28 U.S.C., §2463 constituted a specific statutory bar to original state court jurisdiction. However, that staute, which provides that property "taken or detained" under any Internal Revenue law shall be "subject only to the orders and decrees" of the federal District Courts, was enacted in order to protect the custody of property seized by federal revenue officers while it was in their possession, against "more or less summary state court action," *New Hampshire Fire Ins. Co.* v. *Scanlon,* 362 U.S. 404 (1960). It has uniformly been held that §2463 does not apply where, as here, the property levied upon has already been converted into cash and the proceeds covered into the Treasury and thus, no longer exist as an identifiable *res. First National Bank of Emlenton* v. *United States, supra* (265 F2d at 300); *Pennsylvania Turnpike Commission* v. *McGinnes,* 268 F.2d 65, 66 (3d Cir. 1959).

Moreover, there are sound policy reasons to support the view that a state court has original jurisdiction of actions brought by non-taxpayers against collectors of Internal Revenue. By definition, the validity or amount of the assessment is not at issue. The only issue in such cases is whether and to what extent the taxpayer had "property" or "rights to property" to which the federal government's tax lien could attach under 26 U.S.C., §6321. And this Court has consistently held that that issue must be resolved solely by reference to state law. *Aquilino* v. *United States*, 363 U.S. 509 (1960). It is therefore entirely consistent with federal policy for the courts of the several states to exercise original jurisdiction in such cases. As this Court stated in *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936):

> ". . . Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them . . ."

And, it is familiar and normal procedure for the United States to undertake to vindicate its tax liens in suits instituted in state courts by some other claimants of rights in the property. See *e.g.*, *United States* v. *City of New Britain*, 347 U.S. 81 (1954); *United States* v. *Vorreiter*, 355 U.S. 15 (1957).

II.

A classic situation for certification is presented when, as herein, the decision sought to be reviewed proclaims a rule which is contrary to that adopted by the Court of Appeals of another Circuit.

The decision of the Court below is in conflict with the decision of the Court of Appeals of the Ninth Circuit in *Johnston* v. *Earle,* 245 F.2d 793 (1957),* where it was held that state courts do have original jurisdiction over a suit brought against the Collector of Internal Revenue for wrongfully levying upon property to satisfy tax liens. In that case, the Collector and other revenue agents, acting in their official capacities, seized plaintiff's tractor pursuant to a federal tax levy. Plaintiff brought suit in the Federal District Court, seeking damages by reasons of defendants' allegedly tortious conversion of his property. A trial on the merits resulted in judgment for defendants. The Ninth Circuit reversed, holding that while the plaintiff's cause of action was "undoubtedly a tort cognizable in a state court," no federal statute had conferred original subject matter jurisdiction upon the federal district courts. 245 F.2d at 796. The Court held that 28 U.S.C. §1340 was inapplicable, as plaintiff's cause of action did not "arise under the internal revenue laws," and thus reaffirmed the cases cited above in our discussion of the first question which demonstrate that the County's claim against the district director for wrongfully appropriating its state-created property rights was "undoubtedly cognizable" in the state court in the first instance.

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* The opinion in *Johnston* is printed in full in Appendix F, 80a.

In holding that plaintiff's claim against the collector for wrongfully converting his tractor was cognizable in the state courts, and that the federal courts had no concurrent *original* jurisdiction over the subject matter, the Ninth Circuit quoted at length from *Slocum* v. *Mayberry,* 2 *Wheat.* (15 U.S.) 1 (1817) (App. F., p. 83a-84a). In that case, this Court early established the principle that private property rights which are enforceable against federal revenue officers are within the original jurisdiction of the state courts, unless some Congressional statute has specifically conferred exclusive original jurisdiction on the federal courts (see 2 Wheat. at pp. 10 to 12).

The Ninth Circuit thus recognized the fundamental distinction, for jurisdictional purposes, between suits brought against District Directors by taxpayers as contrasted with non-taxpayers. Suits brought by taxpayers necessarily involve the validity of the federal tax assessment, and hence "arise under" the federal revenue laws. Federal district courts therefore have had original jursidiction of all such actions under 28 U.S.C., §1340, and its predecessors. However, where, as here, the plaintiff is a non-taxpayer, the case turns solely on property rights created under state law, and in no sense "arises under" federal law. Thus, as *Johnston* held, in the case at bar the County's suit *had* to be brought originally in the state court. The federal courts could assume jurisdiction only if the defendant District Director exercised his right of removal under 28 U.S.C., §1442(a)(1).

The decision in the court below thus creates a direct conflict between the Circuit Courts on an important jurisdictional question which only this Court can resolve, and which, in fairness to the County, should be certified by

this Court. For, if as we believe, *Johnston* was correctly decided, then the effect of the determination below is utterly to deprive the County of *any* forum in which its claim could have been litigated!

III.

Congressional enactment pendente lite of federal jurisdiction of such actions and authorization of substitution of the United States as a party defendant, rendered any concept of derivative jurisdiction inapplicable herein.

That Congress never could have intended that a plaintiff in the County's position was utterly without remedy is further demonstrated by the enactment in 1966 of 26 U.S.C., §7426, wherein Congress for the first time provided that suits such as the one at bar could be maintained directly against the United States in the federal courts.

As we have seen, prior to 1966 non-taxpayers whose property had been seized and covered into the Treasury in order to satisfy another's tax liability could maintain a common law action but *only* against the District Director. By enacting 26 U.S.C., §7426, Congress finally interred the anomalous relic of the presence as a defendant of the District Director. The statute permits third persons who claim an interest in or lien on property levied upon, to bring a civil action against the United States, regardless of whether the property has been surrendered to or sold by the District Director, and if "the court determines that such property has been wrongfully levied upon, the court may . . . grant a judgment for the amount of money levied upon" (§7426(a) and (b)(2)(B)).

Subsection (d) provides that "no action may be *maintained* against [the District Director or former District Director] with respect to any acts for which an action could have been maintained under this section"; and subsection (e) states that if any action which could be brought against the United States thereunder is "improperly brought" against the officer or former officer, the court "shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee *as of the time such action was commenced* upon proper service of process on the United States." (Emphasis added.)

The Court below held that the 1966 statute was of no avail to the plaintiff. The Court reasoned that since the right to sue the United States thereunder was limited to the federal district courts, the derivative jurisdiction rule of *Lambert* was applicable to any claim asserted by the County under 26 U.S.C., §7426 (App. A, p. 18a). We submit that the Court below erred for the following reasons.

Although the waiver of sovereign immunity embodied in §7426(a)(1) was limited to the federal courts, clearly the statute is applicable where, as here, an action had been instituted against the District Director in the state courts prior to 1966, and was pending on removal in the federal courts as of the effective date of the statute.

The *Lambert* rule has been criticized as indefensible from the point of practical judicial administration. 1A *Moore's Federal Practice* (2d Ed. 1965), p. 86-87. The concept of derivative removal jurisdiction is especially anomalous when applied to cases removed to the federal courts under §1442(a)(1). In those cases,

the removal option expresses one overriding federal policy—when a suit in a state court against a federal officer exposes him to civil or criminal liability for acts performed in his official capacity, he is entitled to have the merits of the claim resolved in a federal forum. Once that objective has been fulfilled by the removal, it seems anomalous, to say the least, to hold that the federal court must dismiss the action for want of jurisdiction, even where the action is such that the federal courts would have had original jurisdiction over the subject matter.

The enactment of 26 U.S.C., §7426 during the pendency of this case renders application of *Lambert* wholly indefensible. Here, Congress has created a new and independent basis for original federal court jurisdiction that was nonexistent when this suit was instituted, and when it was removed by the District Director under §1442(a)(1). To hold, as did the Court below, that the case nevertheless must be dismissed for want of jurisdiction renders the *Lambert* rule not only anomalous but palpably unjust.

Here, as in *Moore Ice Cream Co.* v. *Rose, supra,* "a fine sense of honor has brought the statute into being," and the Act should be applied "in a kindred spirit" (289 U.S. at 379). Implementation of that approach requires that the case at bar be held beyond the pale of *Lambert.* In that regard, we note that in the case at bar, the District Director first invoked 26 U.S.C., §7426; whereupon the County amended the Third Count of its complaint in order to make it conform to the very prayer contained in the District Director's answer thereto (App. G, p. 103a).

IV.

As to the merits of the controversy, which depended solely upon state law, the Court below decided important questions of New Jersey law contrary to the applicable decisions of the New Jersey Supreme Court. Specifically, the Court below erred in reversing the District Court's determination that under New Jersey law the County was entitled to prevail once it becomes clear that the money in suit was both a product of gambling and used by Moriarty as a bank for his continuing gambling operations—all of which was expressly found by the District Court upon abundant evidence.

It is well settled that state law, and not federal law, must control in determining whether or not any property rights existed in Moriarty in the $2,438,110, to which any federal lien might attach. *Aquilino* v. *United States,* 363 U.S. 509 (1960); *United States* v. *Durham Lumber Co.,* 363 U.S. 522 (1960).

Both opinions rendered in the Court below, insofar as they dealt with the merits of the County's substantive claim, conflict with *Aquilino* and *Durham Lumber,* because the opinions below construe the New Jersey forfeiture statute, N.J.S. 2A:152-6, in a manner that is completely at variance with the applicable decisions of the New Jersey Supreme Court. Thus, the Court below, in reversing the District Court's holding that the $2.4 million were subject to forfeiture under New Jersey law, has decided important state questions in a manner in conflict with applicable state law.

The basic issues tried in the case at bar was whether under state law, Moriarty had "property" or "rights to property" in the $2.4 million on July 5, 1962 to which a

federal tax lien could attach. Accordingly, the District Court did not decide this case until after the New Jersey Supreme Court had rendered its opinion in the related case of *Farley* v. *$168,400.97,* 55 N.J. 31 (1969) (App. D, p. 50a). The District Court observed that under New Jersey law, as authoritatively pronounced by the New Jersey Supreme Court in *Spagnuolo* v. *Bonnet,* 16 N.J. 546 (1954), and reaffirmed in *Farley* v. *$168,400.97, supra,* the forfeiture of gambling contraband occurs and is complete upon the commission of the offense (which in this case admittedly could not have been later than February 20, 1962, when Moriarty was arrested and put out of business). The District Court then held that Moriarty's title to the $2.4 million had been divested and forfeited to the County of Hudson prior to the effective date of the Federal tax lien (App. B, p. 38a).

The District Court's holding was based upon two findings of fact, either of which would have been sufficient in the Court's view of New Jersey law to sustain the forfeiture: (a) the money was wholly the product or proceeds of Moriarty's illegal numbers operation—a fact which the Government's witnesses never disputed and (b) that the $2.4 million was needed by Moriarty as a "bank" to carry on his business (App. B, 37a-38a).

The opinions rendered in the Court of Appeals reflect a material divergence of views on this phase of the case. Judge McLaughlin held that there was no "legitimate evidence that the money was "the result of a gambling operation" (App. A, 16a) and that there was "no evidence introduced which would honestly indicate any sort of a *current* gambling operation was at all connected with the money in suit" (*Id,* at 17a). Presumably therefore, in his view, the action should have been dismissed

on the merits even if subject matter jurisdiction were present in the Court below.

The opinion of Judge Adams, in which Judge Ganey concurred, agreed with the Government's legal contention —that the proceeds of an illegal gambling operation are not forfeitable on that account alone under state law but that the County had to show that they were used by Moriarty in his numbers business. However, Judge Adams did not view the District Court's opinion as embodying a "finding" that the money was needed by Moriarty or available for use by him as the "bank" for his lottery business (App. A, p. 30a). He then stated that the evidence on this point was conflicting, and from his view of the printed record, he could not say that either side should prevail as a matter of law. Judge Adams therefore concluded that if jurisdiction were present, he would have remanded the case to the District Court for further findings of fact concerning Moriarty's use of the $2.4 million (*Ibid*).

Petitioner submits that on this phase of the case the Court below erred in several important respects.

(a). The District Judge's holding that the proceeds or product of gambling are subject to forfeiture under New Jersey law was eminently sound in view of *Farley* v. *$168,400.97, supra.* The holding of the New Jersey Supreme Court in *Farley* v. *$168,400.97, supra,* which reaffirmed *Spagnuolo* v. *Bonnet, supra,* that the divestiture of the gambler's title under N.J.S. 2A:152-6 occurred *eo instanti* at the time the moneys were wrongfully used (App. D, pp. 60a to 63a), necessarily leads to that conclusion. For, as the New Jersey Supreme Court held, Moriarty's title to money which came into his hands as a result of his numbers operation was thereupon immediately for-

feited. It follows therefrom that his subsequent non-use of the money could not operate to defeat the forfeiture, especially where, as here the money was found secreted in the trunk of an automobile parked in a garage, rented by Moriarty and located in close proximity to the garage from which he was running his numbers operation on the occasion of his last arrest and where, as here, at the time the moneys were discovered, no rights of third parties had intervened. See also, *State* v. *Link, supra,* (14 N.J. 446, 102 A.2d 609).

(b). Moreover, the opinion below per Judge McLaughlin held that the County had to prove that the $2.4 million was "the result of a gambling operation . . . an impossible task as to which there was no legitimate evidence" (App. A, p. 16a). However, as pointed out above, both sides including the Government's witnesses, admitted that the money was wholly the product of Moriarty's gambling operation (p. 11, *supra*). The appellate court in thus reversing the trial court's finding on *undisputed* evidence, has so far departed from the accepted and usual course of appellate judicial proceedings as to call for the exercise of this Court's power of supervision.

(c). The opinion of Judge McLaughlin below also states that there was "no evidence" to "indicate that any sort of a current gambling operation was at all connected with the money in suit" (17a). That statement likewise conflicted with the applicable decisions of the New Jersey Supreme Court on an important question of state law. For, in *State* v. *Link* and *Farley* v. *$168,400.97,* both *supra,* the gambling operations had terminated months before the moneys were found; yet in both cases the forfeitures were affirmed by the New Jersey Supreme Court. Thus, in the case at bar, there was no need for the County to

prove that the money were connected with a "current" gambling operation, *i.e.*, one existing as of July 3, 1962, when the money was found.

(d). Finally, assuming *arguendo* that under state law the County had to adduce evidence that the $2.4 million was used by Moriarty in connection with his multi-million dollar lottery business, cogent testimony was introduced by the County that the $2.4 million was Moriarty's "bank" (App. A, p. 30a). As to this factual issue, the District Court's opinion states (App. B, pp. 37-38):

> "The proofs at trial showed that the currency here in issue had been in Moriarty's possession immediately prior to his incarceration for the possession of lottery slips, and that Moriarty's sole occupation was operating a 'numbers racket,' in Jersey City. While the court finds that, on occasion, a 'bank' larger than $168,400.97 would have been needed by Moriarty to carry on his wagering business, and that, therefore, the $2,438,110 was needed by Moriarty in the carrying on of his business,[3*] such a finding is unnecessary, as it is clear that the currency found was wholly the 'product' of a gambling operation."

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* The Court's footnote reads:

> "[3] The testimony at trial, adduced through various Internal Revenue Service agents, indicated that Moriarty employed between 124 and 140 runners in his gambling operation, and that daily play ranged from $30,000 to $61,000, with the average daily play totalling approximately $40,000. An agent familiar with this type of gambling operation also testified that Moriarty was a sole operator, and that his operation was the largest he had ever come across. Moriarty's payoff on a numbers hit was 600-1."

Thus, faced with conflicting expert testimony as to whether Moriarty in fact needed the $2.4 million in connection with the carrying on of his gambling operation, the trial judge credited the evidence adduced by the County. The District Court's further observation that the finding which he had just made was "unnecessary", does not alter the nature of the preceding finding. Rather, it merely reflected his view that under the New Jersey law it was sufficient for the County to prove that the money was "wholly the 'product' of a gambling operation."

We therefore submit that the concurring opinion (which expresses the views of the majority of the panel in the Court below on this point), erred in stating that if subject matter jurisdiction were present, the cause should be remanded to the District Court. A determination on the threshold question of jurisdiction favorable to the County would require the judgment entered in the Court below to be reversed and the judgment entered in the District Court to be affirmed.

V.

The Court below erred in holding that a New Jersey limitation statute, which was never pleaded in the trial Court, barred the County's substantive claim for forfeiture.

The opinion of Judge McLaughlin below also held that N.J.S. 2A:14-10, which provides for a one-year limitation on the commencement of "actions at law brought for any forfeiture upon any penal statute" barred the County from claiming that the money in suit was contraband under New Jersey law (App. A, p. 17a). We submit that

the holding was manifestly erroneous for the following reasons:

(a) The cited limitations statute was raised by the Government for the first time on appeal. Limitations was never pleaded as a defense to the County's claim; nor was it mentioned at any time during the trial. Rule 8(c) of the Federal Rules of Civil Procedure provides that the statute of limitations is an affirmative defense and must be pleaded. Therefore, the Court of Appeals should have refused to even consider the Government's argument based on that statute. *Badway* v. *United States,* 367 F.2d 22 (1st Cir. 1966).

(b) The statute plainly would not be applied by the New Jersey Supreme Court to cases involving the forfeiture of gambling contraband under N.J.S. 2A:152-6 in view, among other things, of the fact that the New Jersey courts have consistently held that forfeitures thereunder are absolute—the statutory transfer of title occurs prior to seizure, and the forfeiture in no way depends upon seizure. See *Farley* v. *$168,400.97, supra* (App. D, pp. 65a and 66a).

(c) Even assuming *arguendo* the limitations statute were applicable to forfeitures arising under N.J.S. 2A: 152-6, it would be of no avail to the defendants herein. It is well settled that the defense of the statute of limitations is a personal privilege. This defense could have been exercised only by Moriarty at his option. *Central Hanover Bank & Trust Co.* v. *U. S. Traction Co.,* 95 F. 2d 50 (2d Cir., 1938). Here Moriarty defaulted in answering the complaint and supplemental complaints, and thereby admitted that the moneys were contraband. *Spagnuolo* v. *Bonnet, supra* (16 N. J. at 559).

(d) Finally, as noted above, the County's substantive claim was based, in part, on the factual contention that the money in suit was used by Moriarty as the bank for his illegal numbers operation. Since Moriarty conducted his numbers business until February 19, 1962, and this suit was instituted in September, 1962, it is clear that in no event would the one-year limitation statute have barred this action.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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